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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ANITA REYOS, ET AL., PETITIONERS

v.

FIRST SECURITY BANK OF UTAH, N.A., UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN *REYOS*

OPINIONS BELOW

The opinions of the court of appeals in these consolidated cases are separately reported at 431 F.2d

1337 and 1349 and are set forth at pages 576-587 and 587-588 of the Appendix.

JURISDICTION

The judgments of the court of appeals were entered on June 19, 1970. Motions for rehearing were denied on November 12, 1970 (App. 588). The petition for a writ of certiorari was filed on February 9, 1971, and granted on April 19, 1971 (402 U.S. 905). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under 25 U.S.C. 345, the United States has consented to a suit to compel the conveyance to certain terminated Indians of an undivided 27 percent interest in the mineral estate of a reservation, which interest was distributed to individual Indians through shares of a corporation responsible for jointly managing the estate.

2. Whether, after termination of federal supervision over certain Indians and removal of restrictions on their property, the United States has a continuing duty, for purposes of tort liability, to advise them with respect to sales of their stock in a corporation formed by them to manage tribal mineral rights.

3. The Securities and Exchange Commission as *amicus curiae* in *Reyos* will discuss the following question: Whether under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder a seller may recover against the agent who transfers his securities where the agent develops a

market for the seller's securities and reaps a financial gain from the buyers by facilitating transfers of these securities, but fails to disclose to the seller the agent's financial interest in the transaction and the fact that the securities are selling for a significantly higher price in the market developed and encouraged by the agent.

STATUTES AND RULE INVOLVED

The Ute Partition Act of August 27, 1954, 68 Stat. 868, as amended, 25 U.S.C. 677-677aa, is reprinted in an Appendix to petitioners' brief, pp. i-xviii, and is reprinted in an Appendix to this brief at pp. 69-90 *infra*.

The Act of August 15, 1894, 28 Stat. 305, as amended, 25 U.S.C. 345, is reprinted in an Appendix to this brief at pp. 90-91 *infra*.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 (17 C.F.R. 240.10b-5), promulgated by the Commission under the Securities Exchange Act of 1934, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

THE INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

Private civil actions charging violations of the federal securities laws are a "necessary supplement" to the Commission's own enforcement actions. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432. Such private litigation reinforces the deterrent impact of securities regulation and also provides a restorative remedy to investors who have been injured by securities violations.

The most pervasive concept underlying the federal securities laws is the investor's right to know—his

right to deal with other investors, with corporate issuers and with those acting as professionals in the securities industry on a basis of trust and confidence. This right depends for its fulfillment upon the disclosure to the investor of all facts that might bear weight in any rational process of investment decision-making. In *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186, this Court emphasized that a "fundamental purpose, common to those [securities] statutes, was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* * * *." What is required is not that all investors be equally judicious and prudent in their investment decisions, but that all material facts necessary to the making of such decisions be placed before investors for evaluation, that no material facts which might reasonably influence those decisions be withheld.

No single provision of the federal securities laws is more important as a safeguard of the investor's right to know than Section 10(b) of the Securities Exchange Act of 1934, as implemented by the Commission's Rule 10b-5 thereunder; these "may well be the most litigated provisions in the federal securities laws * * *." *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 465. As general proscriptions against manipulation, deception and fraud in connection with the purchase and sale of securities, these provisions were purposefully drafted to encompass every conceivable means by which investors could be deprived of their right to know. The lower federal courts, and this

Court itself,[1] have generally interpreted the anti-fraud provisions of the federal securities laws flexibly, in accord with the broad remedial purposes they were designed to serve. Thus, the courts have read Section 10(b) and Rule 10b-5 as prohibiting "fraudulent schemes, tricks, devices, and all forms of manipulation," however presented to investors. *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195, 202 (C.A. 5), certiorari denied, 365 U.S. 814.

It is therefore a matter of critical concern to the Commission that the decision of the court of appeals in *Reyos* with respect to petitioners' claims against the Bank and its employees appears to diverge sharply from generally prevailing interpretations of Rule 10b-5.

STATEMENT

These two consolidated cases involve claims relating to the Ute Partition Act of August 27, 1954, 68 Stat. 868, as amended, 25 U.S.C. 677-677aa. In 1954 the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah had a total membership of 1765, consisting of two district groups—the full-bloods (1326) and the mixed-bloods (439).[2] The Act provided for

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[1] See *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, *supra*, 375 U.S. at 195; *J.I. Case Co.* v. *Borak*, 377 U.S. 426; *Tcherepnin* v. *Knight*, 389 U.S. 332; *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375.

[2] H.R. Rep. No. 2493, 83d Cong., 2d Sess. 2 (1954).

partition and distribution of the Tribe's assets between the mixed-blood and full-blood members of the Tribe, for termination of federal supervision over the trust and restricted property of the mixed-blood members, for a development program for the full-bloods with a view toward termination of federal supervision of them, and for other matters relating to separation of the two groups.[3] At this time the estimated value of the cash, accounts receivable and land owned by the Tribe totalled nearly $21 million;[4] the Tribe's other assets included oil, gas and mineral rights,[5] and unadjudicated and unliquidated claims against the United States.

The Act defined "full-blood" as a "member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half," 25 U.S.C. 677a(b); "mixed-bloods" were those members of the Tribe who were not full-bloods, 25 U.S.C. 677a(c). For purposes of the Act, the mem-

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[3] 25 U.S.C. 677; see generally Bureau of Indian Affairs, Phoenix Area Office, *History of the Ute Partition Act on the Uintah and Ouray Reservation*, a copy of which we are lodging with the Clerk of this Court.

[4] S. Rep. No. 1632, 83d Cong., 2d Sess. 6 (1954); H.R. Rep. No. 2439, 83d Cong., 2d Sess. 4 (1954). Much of the cash consisted of the Tribe's sixty percent share of the 1950 settlement judgment of $31 million in *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433. (The remaining forty percent went to the Southern Ute Tribe. See *United States* v. *Southern Ute Indians*, 402 U.S. 159.) See 25 U.S.C. 672.

[5] Primarily oil shale deposits underlying the Reservation (App. 528).

bership rolls submitted by the Tribe to the Secretary of the Interior within thirty days after the effective date of the Act were to be considered final. 25 U.S.C. 677g. The Act further provided that upon publication of the final rolls "the tribe shall thereafter consist exclusively of full-blood members" and "[m]ixed-blood members shall have no interest therein except as otherwise provided" in the Act. 25 U.S.C. 677d.[6]

After publication of the final membership rolls, the tribal business committee of the full-blood group and the authorized representative of the mixed-blood group were to formulate a plan for dividing the Tribe's assets on the basis of the "relative number of persons comprising the final membership roll of each group." 25 U.S.C. 677i.[7] When this had been completed, the mixed-bloods were to prepare a plan for distributing their portion of the assets to the individual members of the mixed-blood group. 25 U.S.C. 677*l*. After each mixed-blood had received his distributive share of the plan, either directly or through a corporation in which he had an interest, federal restrictions on his property were to be removed, 25 U.S.C. 677*o*; when this had been done, the Secretary

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[6] The final membership roll was published on April 5, 1956, and consisted of 490 mixed-bloods and 1314 full-bloods. 21 Fed. Reg. 2208-2220.

[7] The ratio for division of the assets was 72.83814 percent for the full-bloods and 27.16186 percent for the mixed-bloods since the final roll consisted of 1804 members, 490 of whom were mixed-bloods and 1314 of whom were full-bloods (see note 6 *supra*). (The court of appeals in *Affiliated Ute* (App. 587) and the district court in *Reyos* (App. 465) misstated the mixed-bloods' percentage as 27.1686, as had petitioners in their complaint in *Affiliated Ute* (App. 538).

was to publish a "proclamation declaring that the Federal trust relationship to such individual is terminated." 25 U.S.C. 677v.

Section 677e of the Act authorized the mixed-blood group to organize, to adopt a constitution, and to provide in their constitution for the selection of authorized representatives who could take any action "required by sections 677-677aa of this title to be taken by the mixed-blood members as a group." Accordingly, in 1956 the mixed-bloods formed Affiliated Ute Citizens of the State of Utah, an unincorporated association (Ex. App. 151). Among other things, Affiliated Ute's constitution empowered its board of directors to delegate to corporations organized in accordance with the Act "such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized" (Article V, section 1(b), Ex. App. 155).

The Ute Distribution Corporation was formed in 1958 for the purpose of managing "jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe * * * all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practical distribution to which the mixed-blood members of the said tribe * * * may become entitled * * * and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation * * *" (Ex. App. 3-4). Formation of a corporation and issuance of stock for these purposes constituted part of the plan formulated by the mixed-

bloods for distributing assets to the individual members of their group (Ex. App. 141).[8] In a general membership meeting on November 1, 1958, Affiliated Ute Citizens approved the articles of incorporation of Ute Distribution Corporation (Resolution No. 58-G5; Ex. App. 18), and, on January 7, 1959, "irrevocably" delegated authority to the Ute Distribution Corporation, as well as to two other companies of the mixed-bloods—the Antelope Sheep Range Company and the Rock Creek Cattle Company (see 25 U.S.C. 677*l*(3)),[9] to accomplish the purposes for which they were formed.[10] Ute Distribution Corpo-

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[8] Resolution No. 56-66 of Affiliated Ute Citizens states that the "plan was ratified by unanimous vote by the membership at a Special General Membership Meeting held at Fort Duchesne, Utah on July 14, 1956." This Resolution is not contained in the record in these cases but is part of the record in *Affiliated Ute Citizens, et al.* v. *United States*, No. 156-69, Court of Claims, where it is included as Affidavit No. 3, Item 9, in support of the government's motion for summary judgment, which is currently pending. (The same counsel represents petitioners here and plaintiffs in the Court of Claims case.)

[9] Both of these corporations issued 1 share to each of the 490 mixed-bloods (App. 469).

[10] Resolution No. 59-8. This resolution is not contained in the Appendix before this Court, but is reprinted in full in the appendix to petitioners' brief in *Reyos* in the court of appeals, at pp. 7-8. The resolution reads as follows:

RESOLUTION NO. 59-8
UINTAH AND OURAY AGENCY
FORT DUCHESNE, UTAH

January 7, 1959

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE AFFILIATED UTE CITIZENS OF

ration thereafter issued 4900 shares of stock, 10 to each mixed-blood Ute (App. 578). By agreement of December 31, 1958, between the Corporation and re-

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THE STATE OF UTAH, that the Board of Directors of the Affiliated Ute Citizens of Utah delegate the authority to all three corporations—Antelope Sheep Range Company, Rock Creek Cattle Company and the Ute Distribution Corporation, to organize in accordance with the constitution of the Affiliated Ute Citizens of the State of Utah, Article V, Section 1, Paragraph (b) as follows:

"To irrevocably delegate to corporations, or the officers thereof, organized pursuant to and in accordance with Public Law 671—83rd Congress, 2nd Session (68 Stat. 868), to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized."

/s/ ELMER HACKFORD
Elmer Hackford, *President*

/s/ JOSEPH A. WORKMAN
Joseph A. Workman, *Member*

/s/ ELIZABETH BUMGARNER
Elizabeth Bumgarner, *Member*

/s/ PRESTON V. ALLEN
Preston V. Allen, *Vice President*

/s/ LULA H. MURDOCK
Lulu H. Murdock, *Member*

CERTIFICATION

I hereby certify that the above resolution was adopted by the Board of Directors of the Affiliated Ute Citizens of the State of Utah, at a Special meeting held at Fort Duchesne, Utah, on the 7th day of January, 1959, at which a quorum was present and by a vote of 5 for and 0 against.

/s/ CRYSTAL WILCKEN
Secretary, Board of Directors

spondent First Security Bank of Utah, the Bank became transfer agent for this stock. The Bank also held physical possession of the stock certificates (Ex. App. 13-15).[11]

The Ute Distribution Corporation's articles of incorporation included a provision that, prior to August 27, 1964, no sale of the shares would be valid unless first offered to members of the Tribe in a form approved by the Secretary; if the offer were not accepted by any member of the Tribe, the sale to others must be at a price no lower than that stated in the offer (Ex. App. 6).[12] The articles of

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[11] The Corporation decided to deliver the stock certificates to the Bank rather than to the individual shareholders "because of some rather unfavorable experiences had in the Indian services with the loss of valuable instruments" (Ex. App. 19-20).

[12] Compare 25 U.S.C. 677n, which granted a similar right of first refusal for sales of interest in real property within 10 years from August 27, 1954, the effective date of the Act:

> Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period.

incorporation provided further that each stock certificate should contain the following: "Transfer of this certificate at any time prior to August 27, 1964, to a person not a member of the Ute Indian Tribe * * * shall be invalid unless the certificate of the Superintendent of the * * * Reservation is endorsed thereon showing that a prior and proper offer has been made to members of said tribe * * *" (Ex. App. 6, 107). In addition, each certificate bore on its face in red lettering the following (Ex. App. 106):

WARNING

This certificate does not represent stock in an ordinary business corporation. This corporation is organized for the purpose of distributing to the stockholders in the future their respective shares in the proceeds or income from all claims and assets in which the mixed-blood members of the Utah Indian Tribe of the Uintah and Ouray Reservation, Utah have or will have an interest under the provisions of Public Law 671—83rd Congress, approved August 27, 1954, 68 Stat. 868, as amended. The future value of, or return on, this stock cannot be determined. This stock certificate should neither be sold nor encumbered by the owner thereof, but should be retained and preserved for the benefit of the stockholder and the stockholder's family.

And (in black type):

Countersigned, First Security Bank of Utah, N.A., Fourth South Office, Transfer Agent, Salt Lake City, Utah, By

_____

Authorized Officer

The mixed-blood shareholders were advised of the substance of the foregoing warning on numerous occasions after the stock had been issued (App. 472); many responded to this advice by saying that the "ten shares of Ute Distribution was their business, and they could do as they pleased with it." [13]

On August 5, 1960, the Secretary of the Interior promulgated regulations setting forth, among other things, the procedure a mixed-blood should follow before selling his stock in a corporation of the mixed-bloods to an outsider prior to August 27, 1964. 25 Fed. Reg. 7620; 25 C.F.R. (1965 Cum. Pocket Supp.) 243.1-243.12. These regulations provided that if a mixed-blood determines to sell his stock, "he shall first offer it to the members of the tribe in accordance with the provisions set forth in the Articles of Incorporation and in the certificate of stock of such corporation and in the manner provided in §§ 243.5 through 243.10, as far as practicable." 25 C.F.R. 243.12. Pursuant to Sections 243.5-243.10, which established procedures for a mixed-blood's disposing of his interest in real property, [14] the seller would first notify the Superintend-

[13] Testimony of Mrs. Lena D. Sixkiller, a member of the mixed-blood group and President of the Ute Distribution Corporation (App. 326-342, 343). Mrs. Sixkiller said that she agreed (App. 343). See also Ex. App. 34.

[14] After "termination of Federal supervision over the property of a mixed-blood member * * * and before August 27, 1964" a mixed-blood could sell his interest in real property "after having provided members of the tribe with an opportunity to meet his sales price or meet the highest bona fide offer received by him, which opportunity shall be referred to as a 'right of first refusal' in members of the tribe." 25

ent of the Reservation of the price and terms on which his stock is offered for sale. 25 C.F.R. 243.5. The Superintendent then notified the corporation and the business committee, of the Tribe and posted notices at various locations around the Reservation. 25 C.F.R. 243.6. If no member of the Tribe accepted the offer, the Superintendent so informed the mixed-blood, who could then "sell such [stock] at any time within six months thereafter to any person at the same or greater price and upon the same terms and conditions upon which it was offered to the members." 25 C.F.R. 243.8. After making the stock offering in the manner provided by the regulations and then selling to a non-member of the Tribe, the selling mixed-blood furnished an affidavit to the Superintendent of the Reservation, stating the amount he received in the sale of his shares (App. 207).[16] Since the articles of incorporation of Ute Distribution Corporation also required that each stock certificate contain the endorsement of the Superintendent that the stock had been first offered to members of the Tribe (Ex. App. 6), the Superintendent prepared such a certificate and sent it to the Bank, which subsequently attached it to the stock certificate (Ex. App. 28-30).

C.F.R. 243.4. This "right of first refusal" with respect to interests in real property had been provided in the Ute Partition Act, 25 U.S.C. 677n. See note 12 *supra*.

[16] The details of this procedure, including the requirement of an affidavit by the seller, were developed by the First Security Bank in conjunction with the Corporation (Ex. App. 29-31).

After removal of restrictions on the property of the individual mixed-bloods, the Secretary was required to publish a proclamation in the Federal Register that the federal trust relationship to them was terminated. "Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian." 25 U.S.C. 677v. The proclamation was published on August 26, 1961 (26 Fed. Reg. 8042).

In the *Affiliated Ute* case, the association—Affiliated Ute Citizens—purporting to represent all terminated mixed-bloods brought an action on April 25, 1968, against the United States seeking distribution of 27 percent of the mineral estate underlying the Reservation to the individual mixed-bloods "pro-rata" and a determination that plaintiff Affiliated Ute Citizens, rather than the Ute Distribution Corporation, is entitled to manage these interests jointly with the Ute Tribal Business Committee of the full-blood Utes. Jurisdiction was sought to be invoked under 25 U.S.C. 345 and 28 U.S.C. 1399 and 2409. (App. 538-539.) The district court concluded that it had no jurisdiction and dismissed the complaint (App. 564). The court of appeals affirmed, holding that the action was an unconsented suit against the United States and that 25 U.S.C. 345 (waiver of consent with respect to allotment claims) and 28 U.S.C. 1399, 2409 (waiver of consent where the United States is a joint tenant or tenant in common) were inapplicable (App. 587-588).

In the *Reyos* case, which had been instituted three years before the *Affiliated Ute* case by a group of

mixed-bloods,[16] plaintiffs sued the First National Security Bank of Utah, two of its employees, and the United States.[17] The twelve plaintiffs had sold 122 shares of their stock in the Ute Distribution Corporation to various non-Indians (including defendants Gale and Haslem, who were employees of the defendant Bank) (App. 583). At a time when these shares were being sold for between $500 and $700 per share in the non-Indian market, the purchase prices, as reported in the affidavits of the mixed-blood sellers, ranged from $300 to $700 per share, and averaged $500 a share (App. 529 but see n. 47, *infra*). These sales took place during the period from July 1963 to January 1965, after restrictions on the mixed-bloods' property had been removed and after the proclamation terminating the federal trust relationship to each individual mixed-blood had been published.

With respect to the complaint against the United States,[18] the district court in *Reyos* found that the government, through its employees, had reason to know that the mixed-bloods were selling their stock to non-Indians under circumstances of a doubtful nature,[19] that the government owed a duty

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[16] Twelve out of a group of 85 were selected as "bellwether" plaintiffs for purposes of trial (App. 18-19).

[17] The original complaint filed on February 17, 1965, did not name the United States as a defendant (App. 511). The complaint was later amended to add the government as a defendant (App. 4).

[18] A more complete statement of the facts relating to plaintiffs' claims against the Bank and its employees is contained in part III of this brief, *infra* pp. 51 to 57.

[19] See note 47 *infra*.

to the sellers to prevent these sales, that the government's failure to act was the proximate cause of the sales, and that the government was therefore liable under the Federal Tort Claims Act, 28 U.S.C. 2671-2680, for the difference between the "fair value" of the stock and the amount received by the mixed-blood sellers (App. 531-537). The court held, however, that the government was not liable with respect to sales after August 27, 1964 (App. 537); after that date the requirement in the Ute Distribution Corporation's articles of incorporation that a mixed-blood first offer his shares to members of the Tribe (see p. 12 *supra*) and the government's regulations setting forth the procedure to be followed by a mixed-blood in carrying out this requirement (see p. 14 *supra*) no longer applied. The court therefore held that one of the plaintiffs (Charles T. Reed) had no cause of action against the United States because all of his sales of stock occurred after August 27, 1964 (App. 575, 498-499). The district court also found that two other plaintiffs (Oran F. Curry and Joseph A. Workman) had been contributorily negligent and were not entitled to recover against the government (App. 534, 575). As to the nine remaining plaintiffs, the court held that the fair value of their stock was $1500 per share and that the United States was liable for the difference between this amount and what the plaintiffs had received from their sales (App. 537).

The court of appeals reversed the district court's judgment against the United States (App. 576-587). The court held that no form of wardship or limited

trust relationship between the United States and the mixed-bloods existed after termination (App. 580-581). It further held that the right of refusal given members of the Tribe with respect to sales of the mixed-bloods' stock created no duty on the part of the government to the plaintiffs because, as sellers, they "had no rights under the right of refusal"; this "right was granted clearly to permit the members of the Tribe, the Tribe, or the full-blood members to have the first right to purchase property which was about to be sold to an outsider" (App. 580).

SUMMARY OF ARGUMENT

I

A. The court of appeals properly upheld the district court's dismissal of petitioners' actions in the *Affiliated Ute* case, which sought a "pro-rata" distribution to each mixed-blood of 27 percent of the oil, gas and mineral interest on the Reservation. This is an unconsented suit against the United States and is therefore barred. See *Malone* v. *Bowdoin*, 369 U.S. 643. By the Act of August 15, 1894, 28 Stat. 305, as amended, 25 U.S.C. 345, the United States has not agreed to be sued in this kind of action. That statute gives consent only for suits regarding rights to allotments, that is, tracts of land set aside out of a common holding and awarded to individual Indian allottees. The phrase in Section 345 regarding suits where Indians are excluded from any parcel of land refers only to cases where an Indian has or is entitled to an allotment and is wrongfully excluded

from the land. This is not such a suit. In seeking distribution of the undivided mineral estate contained on Reservation land, petitioners are not claiming any right to an allotment or any rights relating to an allotment.

B. The Ute Distribution Corporation (UDC), not Affiliated Ute Citizens, is entitled to manage the mineral rights jointly with the Tribal Council of the full-bloods. The Tribe itself, including the full-blood and mixed-blood members, drafted the Ute Partition Act of 1954 and, in urging Congress to give it favorable consideration, the Tribe's attorney said it was expected that the mixed-bloods would form a "distributing corporation" to manage the mineral rights. Ute Distribution Corporation became this "distributing corporation."

There can be no doubt that the Corporation was validly formed under the Act. Section 677e allowed the mixed-bloods to organize, to adopt a constitution, and to provide in this constitution for the selection of authorized representatives to take any action required by the Act. The mixed-bloods organized Affiliated Ute Citizens in 1956 and adopted a constitution at that time. The constitution authorized Affiliated Ute Citizens to delegate all necessary powers and authority to corporations founded by the mixed-bloods. Such a delegation took place in 1958 when Affiliated Ute Citizens not only approved the Corporation's articles of incorporation and its issuance of stock to each mixed-blood, but also "irrevocably" delegated authority to the Corporation to act in accordance with its articles of incorporation. Pursuant

to Section 677*l*(3) the mixed-blood group were authorized "to transfer a portion of the assets of said group to a corporation or other legal entity for any purpose."

Moreover, after passage of the Uté Partition Act of 1954, Congress recognized the validity of a corporation such as UDC by exempting from corporate income taxes any corporation formed by the mixed-bloods to manage mineral rights. Act of August 2, 1956, 70 Stat. 936. And in 1967 Congress specifically recognized UDC by directing the Secretary of the Interior to pay part of the Ute Tribe's judgment against the United States to the Ute Distribution Corporation. Act of August 1, 1967, 81 Stat. 164, as amended, 25 U.S.C. 676a.

II

A. In *Reyos*, twelve individual mixed-blood plaintiffs claimed that the United States was negligent in preventing them from selling their stock in UDC. It is the government's position that insofar as a duty to these plaintiffs is concerned, the Ute Partition Act of 1954 and the 1961 termination proclamation of the Secretary of the Interior terminated federal supervision over the stock and its transfer by the mixed-bloods.

The Act was drafted by the Tribe, introduced at the request of the Tribe, and supported by both the full-blood and mixed blood groups. Many of the 490 mixed-bloods had never lived on the Reservation and sought immediate termination so that they could receive in cash their interest in Tribal assets, which in 1954 included $21 million in cash, accounts receiva-

ble and land, as well as oil, gas and minerals contained in land on the Reservation. When in 1961 the Secretary of the Interior published a termination proclamation, 26 Fed. Reg. 8042, as Section 677v of the Act required, federal restrictions on the mixed-bloods' property ended and the federal trust relationship to each individual mixed-blood terminated.

Part of the property held by each mixed-blood consisted of stock in mixed-blood corporations, such as the Antelope Sheep Range Company, the Rock Creek Cattle Company, and the Ute Distribution Corporation. Each mixed-blood owned 10 shares of stock of the Ute Distribution Corporation, which the mixed-bloods formed in 1958 to manage mineral rights jointly with the Tribal Council of the full-bloods. Although the 1961 termination proclamation did not serve to remove restrictions on the oil, gas and minerals since these were on still restricted Tribal land and owned in part by the full-bloods who were not terminated, the termination proclamation did remove restrictions on the mixed-bloods' stock in UDC. Thereafter the mixed-bloods were free to sell their stock without governmental approval or supervision. The situation here is the same as when a regular business corporation is restricted by law in the disposition of its assets; such a restriction in no way limits the shareholders' right to dispose of their stock. In this case, the mixed-bloods were not restricted in the sales of their stock in UDC, and the United States should not be held liable for failing to prevent transactions it had no right to control.

B. The right of first refusal with respect to this stock created no duty on the part of the United States to the terminated mixed-bloods seeking to dispose of their shares. Before a mixed-blood could sell his stock to a non-member of the Ute Indian Tribe, he was required first to offer the stock to members of the Tribe at a price not less than that for which he intended to sell to the outsider. Although the Act provided a right of first refusal for sales of real property, 25 U.S.C. 677n, the right of first refusal with respect to UDC stock is not derived from any provision of the Act. Instead the right stems from a provision in the Ute Distribution Corporation's articles of incorporation, which also provided that the offer should be in a form approved by the Secretary. Thus when the Secretary promulgated regulations dealing with the right of first refusal for sales of real property, these were also made applicable to sales of stock as far as practicable.

As to federal supervision of the mixed-bloods and federal restrictions on their property, this provision in the Corporation's articles of incorporation did not serve to postpone the termination that Congress directed in the Act. No residual wardship status remained; termination was complete. After termination the mixed-bloods were free to dispose of their shares of stock as they pleased and the United States had no right or duty to restrict them.

Moreover, the selling mixed-bloods were not within the class of persons entitled to the right of first refusal itself. A seller could not accept his own offer and thereby exercise this right to buy his own

stock. Therefore, even if the right of first refusal were derived from the Act, which it is not, it created no duty on the part of the United States to mixed-bloods sellers, such as the plaintiffs in *Reyos*.

Since the United States owed no duty to mixed-bloods seeking to dispose of their stock, the United States did not negligently fail to prevent them from selling.

III

In the *Reyos* case, plaintiffs also sued the First Security Bank of Utah, N.A., and its employees, John B. Gale and Verl Haslem, seeking damages for these defendants' alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, in connection with sales of their stock in the Ute Distribution Corporation between 1963 and 1965.

Pursuant to an agreement between the Bank and the Corporation in 1958, the Bank became the transfer agent for the stock and handled the documents implementing the right of first refusal; the Bank also held physical possession of the stock certificates. In order to sell his stock each mixed-blood therefore had to deal through the Bank. In practice, defendants' activities went beyond those of a mere transfer agent; defendants actively encouraged a market for these shares, accepted standing orders from non-Indians to buy, and received commissions and gratuities, as well as increased deposits, from non-Indian buyers for facilitating these transactions. During all relevant times defendants were thoroughly

familiar with the "non-Indian" market[20] they had developed where this stock sold for between $500 and $700 per share, and the "Indian" market[21] where the stock sold for an average of $500 per share.

In these circumstances, defendants had a duty to disclose to each mixed-blood seller that they had a financial interest in facilitating the sale of his stock and that the stock was selling for a significantly higher price in the non-Indian market defendants had encouraged and developed.

Rule 10b-5(1) and (3) prohibit "any device, scheme, or artifice to defraud" and "any * * * course of business which operates * * * as a fraud or deceit upon any person" in connection with securities transactions. In *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194, the Court held that fiduciaries in securities transactions have a duty of utmost good faith, requiring full and fair disclosure of all material facts to their clients, and that fraud includes all acts, omissions or concealments which involve breach of a legal duty or trust and by which undue advantage is taken of another. In this case defendants' activities would have brought them squarely within the definition of "brokers" and "dealers" under the Act, 15 U.S.C. 78c(a)(4) and (5), except for the fact that banks are expressly exempted from coverage. However, even though this means that defendants were not required to register

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[20] Transactions between non-Indians.

[21] Transactions between an Indian seller and a non-Indian buyer.

as broker-dealers under the Act, they nevertheless remained subject to Rule 10b-5, which applies to "any person," and their duty of disclosure was analogous to that of other professionals in the securities industry, a duty this Court outlined in *Capital Gains*.

Thus, under Rule 10b-5(1) and (3) defendants were required to disclose all material facts in connection with the securities transactions they facilitated. The facts that defendants had a financial interest in these transactions and that the stock was selling for a significantly higher price in the non-Indian market were "material" because a reasonable investor "might have * * * considered [these facts] important," *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 384. And in the circumstances of this case where the violations consisted of total non-disclosure, a showing that the facts withheld were material is a sufficient basis for imposing liability; plaintiffs should not be required to show reliance since it is wholly conjectural whether an investor would have acted differently had he been advised of all material facts.

In sum, defendants violated Rule 10b-5(1) and (3) by pursuing a course of business that operated as a fraud upon the mixed-bloods in connection with sales of their stock and they should be held liable for any losses of the mixed-blood sellers.

ARGUMENT

These two cases present quite different issues although both involve controversies stemming from

formation of the Ute Distribution Corporation. With respect to the claims against the United States, we turn first to the *Affiliated Ute* case in part I, and then discuss the questions in *Reyos* in part II. Part III consists of the Securities and Exchange Commission's views as *amicus curiae* in support of petitioners' claims in *Reyos* against the Bank and its employees, Gale and Haslem.

I.

The Suit in the *Affiliated Ute* Case Was Properly Dismissed for Want of Jurisdiction as an Unconsented Suit Against the United States

The plaintiffs in the *Affiliated Ute* case sought, among other things, to have conveyed to each individual mixed-blood, "pro-rata," 27 percent of the oil, gas and minerals underlying the Uintah and Ouray Reservation (App. 538-539, 587). We agree with the court of appeals that the district court properly dismissed the action for want of jurisdiction.

The United States may not be sued without its consent (*Dugan* v. *Rank*, 372 U.S. 609; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Louisiana* v. *McAdoo*, 234 U.S. 627), and an action to try title to or seek conveyance of government property is one to which the United States has not consented to be sued (*Malone* v. *Bowdoin*, 369 U.S. 643).

This principle applies equally to Indian land to which the United States holds title in trust. *Minnesota* v. *United States*, 305 U.S. 382; *Oregon* v. *Hitchcock*, 202 U.S. 60, 70; see also *Motah* v. *United States*, 402 F. 2d 1 (C.A. 10); *Seiden* v. *Larson*, 188

F. 2d 661, 665 (C.A. D.C.), certiorari denied, 341 U.S. 950. And it applies also to suits brought by a group of Indians who share in the beneficial interest. *Naganab* v. *Hitchcock*, 202 U.S. 473, 476. That is precisely the situation here. No one disputes that the United States holds title to the land on the Uintah and Ouray Reservation, including the mineral interest (App. 588). Prior to 1954, all members of the Ute Indian Tribe of the Reservation were the beneficial owners of the mineral interest. Under the Ute Partition Act of 1954 the full-blood members now own 72.83814 percent of this property. The 490 terminated mixed-blood members of the Tribe, whom plaintiff Affiliated Ute Citizens purports to represent, owned 27.16186 percent,[22] although some mixed-bloods have disposed of their individual interest by selling their shares of Ute Distribution Corporation stock as they were entitled to do. This then is an action to divest the United States of the title it holds to 27.16186 percent of the property in question. As such, it is an unconsented suit against the United States.

A.

Under 25 U.S.C. 345, the United States has Consented Only to Suits to Enforce an Indian's Right to an Allotment of Land and This Is Not Such a Suit

Petitioners point to the Act of August 15, 1894, 28 Stat. 305, as amended, 25 U.S.C. 345, in support of their view that the United States has consented

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[22] See H.R. Rep. No. 2493, 83d Cong., 2d Sess. 2 (1954); S. Rep. No. 1632, 83d Cong., 2d Sess. 6 (1954). See note 7 *supra*.

to this action.[23] We recognize, of course that "authorization to bring an action involving restricted lands 'confers by implication permission to sue the United States;'" *United States* v. *Hellard*, 322 U.S. 363, 368. But 25 U.S.C. 345, which is set out in the margin,[24] authorizes only actions regarding allotments of land. See, *e.g.*, *First Moon* v. *White Tail*, 270 U.S. 243, 245; *Scholder* v. *United States*, 428 F. 2d 1123 (C.A. 9), certiorari denied, 400 U.S.

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[23] Petitioners have apparently abandoned the assertion of jurisdiction under 28 U.S.C. 1399 and 2409.

[24] 25 U.S.C. 345 provides:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

942;[25] *Harkins* v. *United States*, 375 F. 2d 239 (C.A. 10); *United States* v. *Preston*, 352 F. 2d 352, 355-356 (C.A. 9); *United States* v. *Eastman*, 118 F. 2d 421 (C.A. 9). Thus under Section 345, the "district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty." *Arenas* v. *United States*, 322 U.S. 419, 429.

In this case no question of allotments or of rights regarding allotments is involved. "Allotment" is a term of art in Indian law; it means a tract of land set aside out of a common holding and awarded to an individual allottee. *Reynolds* v. *United States*, 174 Fed. 212 (C.A. 8); see Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331-334; Department of the Interior, *Federal Indian Law* 773-818 (1958 ed.). The 27 percent interest in oil, gas and mineral rights that petitioners seek to have conveyed to individual mixed-bloods "pro-rata" obviously is not a tract of land set aside for an individual

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[25] *Scholder* did not hold that a suit could be brought against the United States to "challenge construction charges for irrigation projects under contracts merely collateral to an Indian allotment," as petitioners state (Pet. Br. 40-41). Instead the court held that "The consent given in section 345 does not encompass appellants' challenge to the expenditure, and the district court properly dismissed the individual appellants' first set of claims against the United States," 428 F. 2d at 1126-1127. In any event, in this case petitioners' claims against the United States in no way relate to an Indian allotment.

Indian. Nor are these rights appurtenant to an allotment or part of an individual allottee's right to full possession of his allotment. Compare *United States* v. *Powers*, 305 U.S. 527, 532-533. The oil, gas and minerals are under tribal land on the Reservation owned by the full-bloods, not under any land allotted to petitioners. And the Ute Partition Act clearly indicates that these minerals are not to be physically divided up and distributed to each individual mixed-blood for the very practical reason that it would be impossible to do so in any equitable manner. See 25 U.S.C. 677i.

If the matter were at all in doubt, and we do not think it is, the inapplicability of 25 U.S.C. 345 plainly appears in light of the relief petitioners seek (see *supra*, p. 27). The remedy provided in Section 345 is that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him." This remedy is entirely inappropriate here since petitioners are not entitled to, and their complaint does not seek, an allotment or allotments.

Petitioners also assert (Pet. Br. 39) that their claim comes within the consent of Section 345 because that Section allows suits where Indians are "excluded from * * * any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress." But taken in context, particularly in view of the phrase conferring jurisdiction on the federal courts and the phrase regarding the remedy

the courts may give, both of which are quoted above, the language petitioners rely upon manifestly refers only to situations where an Indian has or is entitled to an allotment and is wrongfully excluded from the land.[26]

In sum, 25 U.S.C. 345 limits the consent of the United States to suits to enforce an Indian's rights to an allotment and this is not such a suit. Although the district court therefore properly dismissed the action for want of jurisdiction, it is nevertheless appropriate at this point for us to discuss petitioners' claim in the *Affiliated Ute* case, that Affiliated Ute Citizens rather than the Ute Distribution Corporation is entitled to manage the oil, gas and mineral rights,[27] since in this Court petitioners now seek to intertwine this claim with their contentions in the *Reyos* case (Pet. Br. 13, 51-55; see pp. 48-50 *infra*).

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[26] Nor can jurisdiction here be based on the Ute Jurisdictional Act of June 28, 1938, 52 Stat. 1209, as amended by the Act of July 15, 1941, 55 Stat. 593; Act of June 22, 1943, 57 Stat. 160; Act of June 11, 1946, 60 Stat. 255; Act of August 13, 1946, 60 Stat. 1049. Section 1 of that Act confers jurisdiction only on the Court of Claims, which is authorized to "hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent band thereof, may have against the United States, including, * * * claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any land taken from them, without compensation." See *Uintah and White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1.

[27] Petitioners do not argue that there is a separate jurisdictional basis for this claim apart from their general assertion that jurisdiction lies under 25 U.S.C. 345 because they are entitled to the oil, gas and minerals (Pet. Br. 38-41).

B.

The Ute Distribution Corporation Is Entitled to Manage Jointly With the Full-Blood Ute Indians the Oil, Gas and Minerals Underlying the Reservation

As noted above, in the *Affiliated Ute* case, Affiliated Ute Citizens contended that it was entitled to manage the oil, gas and mineral rights jointly with the Tribal Business Committee of the full-bloods, pursuant to Section 677i of the Ute Partition Act, which provides in part that "All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group." As will appear below, contrary to petitioners' claims, the Ute Distribution Corporation not only was formed in accordance with the Act, but is the very kind of corporation that Congress and the Ute Indians themselves sought to allow in 1954 when the Act was considered and passed.

The Ute Partition Act "is the result of proposals initiated by the Ute Tribe of Indians in Utah." H. R. Rep. No. 2493, 83d Cong., 2d Sess. 2 (1954); S. Rep. No. 1632, 83d Cong., 2d Sess. 7 (1954). In urging passage of the Act, which the Tribe itself drafted,[28]

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[28] Hearings on S. 3532 and H.R. 9398 before the Subcommittee of the Senate Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. 9, 45 (June 9, 1954) (unpublished) [hereinafter Hearings]. These Hearings are part of

the Tribe's attorney was asked: "You will have two tribal organizations actually, two business groups, will you not; the full bloods and the mixed groups?" [28] He replied: [29]

> Temporarily. We expect that the mixed blood organization will disintegrate with the exception of a simple distributing corporation, that will be handled like any other corporation, to distribute assets that are not easily divisible, such as income from oil rights, and so forth, that will be assigned to them. That corporation will go on indefinitely. But there will be no particular need for a governing body after a short time.

Affiliated Ute Citizens became the "organization," and Ute Distribution Corporation the "distributing corporation," that the Indians envisaged in 1954. They drafted this legislation so that the mixed-bloods would be able to form such an organization and such a corporation. Examination of the Act's provisions leaves no doubt that they validly realized their objectives.

When the mixed-bloods formed Affiliated Ute Citizens in 1956, they adopted a constitution and by-laws (Ex. App. 151). Section 677e clearly permitted them to do this: "The mixed-blood members of the

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the record as Defendant's Exhibit UB in the *Reyos* case and plaintiffs' Exhibit 14. The Subcommittee also held hearings on this legislation on April 23, 1954, at Fort Duchesne, Utah; these hearings are not published.

[28] Hearings, *supra* note 28 at 51.

[29] *Id.*

tribe * * * shall have the right to organize for their common welfare, and may adopt an appropriate constitution and bylaws." The constitution authorized Affiliated Ute Citizens to delegate to corporations formed by the mixed-bloods "such powers and authority as may be necessary or desirable" (Article 5, Section 1(b); Ex. App. 155). Again Section 677e permitted this in no uncertain terms: "Such constitution may provide for the selection of authorized representatives who shall have power to take any action that is required by sections 677-677aa of this title to be taken by the mixed-blood members as a group." When Ute Distribution Corporation was formed in 1958 to manage mineral rights and unadjudicated claims against the United States jointly with the Tribal Business Committee (Ex. App. 1-4), Affiliated Ute Citizens approved the Corporation's articles of incorporation and the issuance of its stock to the 490 members of the mixed blood group (Resolution No. 58-G5; Ex. App. 18), and delegated authority to the Corporation to act in accordance with its articles of incorporation (Resolution No. 59-8; see note 10 *supra*). This was clearly permitted under Section 677*l*(3): "When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or other legal entity for any purpose, the Secretary is authorized to make such a transfer."

That Congress intended to allow a corporation such as the Ute Distribution Corporation to be formed under the Act is further confirmed by Con-

gress' amendment in 1956 (two years before creation of the Corporation) of Section 677p to provide that any corporation formed by the mixed-bloods for the purpose of jointly managing oil, gas and mineral rights would not be subject to corporate income taxes. Act of August 2, 1956, section 3, 70 Stat. 936. Congress again recognized the Corporation's legitimacy in 1962 when it amended Section 677i to provide that the stock of any such corporation would not be subject to mortgage, levy attachment or other similar processes so long as the "stock remains in the ownership of the original stockholder or his heirs or legatees." Act of September 25, 1962, 76 Stat. 597, 598. And in 1967, when Congress authorized the Secretary of the Interior to divide the trust fund resulting from a judgment against the United States in favor of the Confederated Bands of Ute Indians, Congress directed the Secretary to credit "60 per centum to the Ute Indian Tribe of the Uintah and Ouray Reservation, and the Ute Distribution Corporation." Act of August 1, 1967, 81 Stat. 164, as amended, 25 U.S.C. 676a.

The Ute Distribution Corporation, not Affiliated Ute Citizens, is therefore entitled to manage the oil, gas and mineral rights with the full-bloods.

II.

After Partition of Tribal Property and Termination of Federal Supervision Over the Mixed-Bloods, the United States had no Continuing Duty to Supervise Mixed-Blood Ute Indians in Their Sale of Stock Representing Their Allocated Share of Tribal Assets

A.

The Ute Partition Act of 1954 and the 1961 Termination Proclamation Terminated Federal Supervision for the Benefit of the Mixed-Bloods Over Their Stock and Its Transfer by Them

Termination of federal supervision of the mixed-bloods and their property was one of the express purposes of the Ute Partition Act of 1954.[21] In passing the Act, Congress carried out the wishes of the Ute Indian Tribe for, as previously observed, this legislation was "drafted by the tribe and introduced at the request of the tribe."[22]

For many years prior to 1954 there had been considerable friction between the full-blood and mixed-

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[21] Section 677 provides:

> The purpose of sections 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property.

[22] Letter from Orme Lewis, Assistant Secretary of the Interior, reprinted in H.R. Rep. No. 2493, 83d Cong., 2d Sess. 3 (1954), and S. Rep. No. 1632, 83d Cong., 2d Sess. 7 (1954). See also Hearings, *supra* note 28, at 9.

blood members of the Tribe.[33] As the full-bloods' representative reported, "The way it is now [in 1954], the mixed bloods feel that they are being held back by the full bloods, and the full bloods feel that they, the mixed bloods, are getting the gravy. The full bloods love their reservation and are not as money conscious about it as others."[34] At a meeting on March 31, 1954, called by the Tribe to settle these differences, the General Council of the Tribe voted to separate the Tribe's assets among the mixed-blood and full-blood groups and to write legislation to that end.[35] After a draft of such legislation had been completed, the mixed-bloods met and approved it by a large majority.[36] And when Congress held hearings on this draft, the mixed-bloods' representative urged favorable consideration[37] and reported that[38]

> there are many mixed bloods who will ask for immediate termination. They have never lived on the reservation, and they have nothing there except that their name is on the roll and they are entitled to all the benefits of a full blood member of the tribe. They have their own businesses and don't want to come back to the res-

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[33] Hearings, *supra* note 28 at 7-8 (Statement of Reginald O. Curry, Chairman, Tribal Business Committee).

[34] Hearings, *supra* note 28 at 35 (Statement of Russell Cuch, Representing Full-Blood Members of the Ute Indian Tribe).

[35] *Id.* at 9.

[36] *Id.* at 20.

[37] *Id.* at 18.

[38] *Id.* at 21.

> ervation, and so they will ask for their interest in cash as quickly as possible to improve their living conditions. And there will be many mixed bloods during this period who find that they are a little on their feet now and are capable of assuming full responsibilities and they will ask for full termination.

He also stressed that the mixed-bloods were educated [39] and capable of assuming responsibility for their own affairs after termination.[40]

Thus, when Congress passed the Ute Partition Act in 1954 everyone concerned thought, indeed intended, that after a relatively short period of time [41] federal restrictions on the mixed-bloods' property would end, the federal trust relationship to each individual mixed-blood would terminate, the mixed-bloods would no longer be entitled to federal services for Indians, and the mixed-bloods would, in the eyes of the law, become undifferentiated from their non-Indian neighbors.[42] And that is precisely what

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[39] *Id.* at 19 ("From the acculturation chart we have drawn up of the people on the reservation, that was drawn up by some anthropologists, it shows that on the basis of eight grades that the mixed-blood members are 92 per cent educated, and to the eighth grade the full blood members are only 32 per cent."). Nearly all the mixed-bloods had been to high school and some had been to college. *Id.*

[40] *Id.* at 16.

[41] At most seven years. See 25 U.S.C. 677m, 677p; H.R. Rep. No. 2493, 83d Cong., 2d Sess. 3 (1954); S. Rep. No. 1632, 83d Cong., 2d Sess. 6 (1954).

[42] See Section 677v:

> Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the

happened when, on August 26, 1961, the Secretary of the Interior had the following proclamation published (26 Fed. Reg. 8042):

> Pursuant to the authority contained in section 23 of the Act of August 27, 1954 (68 Stat. 877, as amended; 25 U.S.C. 677v), it is hereby proclaimed that the Federal restrictions on the property of each individual mixed-blood member of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah having been removed, the Federal trust relationship to such individual is terminated and that effective midnight, August 27, 1961, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

The "property" referred to in the proclamation necessarily includes the stock in the Ute Distribution Corporation, which represented each mixed-blood's

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Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated. Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

allocated share of tribal property in oil, gas and minerals, as well as the stock held by each mixed-blood in the Antelope Sheep Range Company and the Rock Creek Cattle Company (see p. 10 *supra*), nearly all of which individual mixed-bloods later sold to the Tribe (App. 503-504). There is no doubt that federal supervision ceased with respect to other property, such as cash and other chattels, actually divided between the full-bloods and mixed-bloods and distributed to each mixed-blood. The stock is no different category. For obvious reasons, the oil, gas and minerals could not be physically divided; the full-bloods, who remained under federal supervision, were therefore given an undivided 73 percent interest.[43] The assets themselves thus remained subject to restrictions after termination because the full-bloods did.[44] But plainly the

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[43] And the mixed-bloods received an undivided 27 percent.

[44] See 25 U.S.C. 677o(a). After a mixed-blood had received his distributive share of tribal assets, whether directly or through a corporation, Section 677o(a) directed the Secretary "to immediately transfer to him unrestricted control of all other property held in trust for" him and thereby terminate federal supervision of the mixed-blood and his property

> except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights or every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of sections 677-677aa of this title, notwithstanding anything contained in said sections to the contrary.

The exception in Section 677o(a) just quoted meant that when each mixed-blood had been terminated, his termination did not serve to remove restrictions on oil, gas and min-

mixed-bloods' stock in the Ute Distribution Corporation did not. The situation is no different from that of a regular business corporation restricted by law in the disposition of its assets beyond a certain percentage.[46] Such a restriction would in no way limit the shareholders' right to dispose of their stock.

"It rests with Congress to determine the time and extent of emancipation" of Indians. *United States* v. *Waller*, 243 U.S. 452, 459-460; see also *Brader* v. *James*, 246 U.S. 88; *United States* v. *Nice*, 241 U.S. 591; *Tiger* v. *Western Investment Company*, 221 U.S. 286, 315; *Crain* v. *First National Bank*, 324 F. 2d 532 (C.A. 9).[46] In the present case, after

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erals themselves. Thus, although 490 mixed-bloods were eventually terminated and although they owned a total of 27 percent of these assets, all of the oil, gas and minerals nevertheless remained subject to restrictions, as did the full-bloods, who were not terminated and who continued to hold an undivided 73 percent interest. On this, there is no dispute among the parties to this litigation; indeed, ever since passage of the Ute Termination Act in 1954 everyone concerned has assumed this to be the proper interpretation of Section 677o(a). See, *e.g.*, Plan for Distribution of the Assets of the Individual Mixed-Blood Members of the Ute Indian Tribe, Uintah and Ouray Reservation, Utah, Article VII (Ex. App. 140-141).

[45] Compare *Cathedral Estates* v. *Taft Realty Corp.*, 157 F. Supp. 895, 897 (D. Conn.), affirmed, 251 F. 2d 340 (C.A. 2).

[46] *Menominee Tribe* v. *United States*, 391 U.S. 404, is not to the contrary. The question in that case was whether termination of federal supervision over the members of the Tribe abrogated pre-existing hunting and fishing rights established by treaty. In holding that these rights still existed after termination, the court recognized that termination of federal supervision of the Indians was nevertheless complete, *id.* at

termination pursuant to the Ute Partition Act, the only remaining restrictions related to tribal property. With respect to the subject matter of this litigation—the stock issued by the Ute Distribution Corporation—termination was complete: the mixed-blood shareholders, including the plaintiffs here, were free to sell whatever the reason, whatever the price. The Secretary had no authority to exercise discretion over whether such a sale should be allowed or over the selling terms, as he could have done if this were restricted Indian property. And we submit that the United States cannot be charged with liability for failing to prevent a transaction it had no right to control.

B.

The Right of First Refusal Created No Duty on the Part of the United States to the Terminated Mixed-Bloods Seeking to Sell Their Shares

Before a mixed-blood could sell his shares to an outsider, he was required first to offer them to members of the Tribe. No member of the Tribe exercised his right of first refusal with respect to plaintiffs' sales, although the Corporation considered buying these shares (App. 516). (The Tribe on behalf of the full-bloods, is reported to have bought 577 shares over the years. Brief for the Ute Indian Tribe and Ute Distribution Corporation as Amici Curiae, at p. 3. The Tribe also bought from individual mixed-bloods over 90 percent of the shares

412. The court did not hold that termination legislation is to be strictly construed with a view to finding continued or residual wardship after termination, as petitioners suggest (Pet. Br. 37).

in the two other mixed-blood companies, see p. 10 *supra*, for $550 per share (App. 503-504).) Petitioners argue that because of this right of first refusal, a residual wardship survived termination and that the United States thus had a duty to prevent improvident sales of stock by the mixed-bloods. Pointing to irregularities in the procedures and documents used to carry out their sales,[47] petitioners contend that because the government should have known of these irregularities, the government failed to fulfill its duty to them to prevent such sales and is therefore liable for their losses under the Tort Claims Act, 28 U.S.C. 2671-2680. (Pet. Br. 45-50.)

Under Section 677n, a mixed-blood seeking to dispose of his interest in *real property* any time within ten years from August 27, 1954, had to offer it first to members of the Tribe; after termination, this requirement "shall be a covenant to run with the land for said ten-year period, and shall be expressly pro-

[47] The affidavits of the mixed-bloods stating that they had sold their shares for a price not less than that offered to members of the Tribe pursuant to the right of first refusal contained in some instances the following defects: "erasures, documents notarized by the transferee or a member of his immediate family, names on the notary seal which differed from the name of the purported notary, operative words of the affidavit including the amount of consideration in different handwriting or different colors of ink appearing to have been added after the document had been signed, and other similar irregularities" (App. 508 [opinion of the district court]). It also appeared in some cases that all of the amount stated on the affidavit had not actually been received in cash; that the sellers had received used cars instead; and that the value of these cars was not sufficient to make up the difference between the cash actually received and the amount stated on the affidavit (App. 474-499; 529).

vided in any patent or deed issued prior to the expiration of said period." 25 U.S.C. 677n.

However, the right of first refusal with respect to Ute Distribution Corporation stock, which constituted personal property of the mixed-bloods, is not derived from Section 677n, or any other statutory provision, as petitioners appear to recognize (Pet. Br. 47). Instead, this right flows from the Corporation's articles of incorporation, which provided that if a mixed-blood determines to sell his stock "at any time prior to August 27, 1964, he shall first offer it to the members of the tribe, including the mixed-blood and full-blood members thereof, and no sale of any of said stock prior to said date shall be valid unless and until said offer is made to said members of the tribe in such form as may be approved by the Secretary of the Interior" (Article VIII, Ex. App. 6). Accordingly, when the Secretary issued regulations regarding the right of first refusal for sales of real property, the regulations included a provision making them also applicable to sales of stock "as far as practicable" and requiring a mixed-blood to offer his stock "to the members of the tribe in accordance with the provisions set forth in the Articles of Incorporation and in the certificate of stock of such corporation." 25 C.F.R. (1965 Cum. Pocket Supp.) 243.12.

As the foregoing makes clear, the Corporation itself created the right of first refusal with respect to its stock. The Corporation's action imposed no statutory duty upon the Secretary; it could not serve to postpone termination; and it did not create any status in the mixed-bloods between wardship and

termination. There is no indication that the mixed-bloods themselves thought the right of first refusal had any of these effects; instead, after termination they considered the stock their own personal property to do with as they pleased.

Even if the issue in this regard involved "*express* rights *contained in the statute*" (Pet. Br. 48), which it surely does not, the right of first refusal created no duty on the part of the United States toward the selling mixed-bloods. To be sure, the other members of the Tribe were entitled to receive an offer before the mixed-blood seller disposed of his shares. But that is not the complaint here. Plaintiffs are those who desired to sell their stock and in fact did so. And they complain of defects in their own affidavits,[48] which attested to their compliance with the right of first refusal. The United States violated no duty to the selling mixed-bloods who, of course, were not in the category of those entitled to the right of first refusal. A seller could not accept his own offer and thereby exercise a right of first refusal to buy his own stock.[49]

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[48] See note 47 *supra*.

[49] Petitioners make much of a supposed error of the court of appeals in viewing the phrase "members of the Tribe" as meaning the Tribe, that is, the still unterminated Tribe, as distinguished from the terminated mixed-bloods (Pet. Br. 47-50). But the court of appeals simply stated (App. 580):

> Considerable argument is presented as to whether or not the mixed-bloods were members of the Tribe for the purpose of the right of refusal or whether the right was in the Tribe as such or in the members, but *this need not be decided* for it is clear that the plaintiffs themselves

In sum, the court of appeals in *Reyos* correctly held that the "right of refusal thus created no duty on the part of the Government to the then terminated mixed-blood plaintiffs who were seeking to sell their shares of stock" and that (App. 580):

> Likewise the procedures and documents devised to carry out the right of refusal and their execution and delivery created no such duty on the part of the United States to the plaintiffs. The statute expressly provides for termination of the Government's relationship with the individual mixed-bloods. The provisions are clear and the termination was accomplished and is final. It is clearly within the power of Congress and no one else to provide for such an end to the relationship between these individuals and the Government. United States v. Waller, 243 U.S. 452; United States v. Nice, 241 U.S. 591; Tiger v. Western Investment Co., 221 U.S. 286. It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination.

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had no right under the right of refusal. * * * [Emphasis added.]

We agree with the court of appeals that it is unnecessary to decide this question because it is irrelevant to the issue at hand. The right of first refusal stems from Article VIII of the Corporation's articles of incorporation, which requires the offer to be made to "members of the tribe, including the mixed-blood and full-blood members thereof" (Ex. App. 6). It is obvious that the Corporation did not adopt this requirement for the benefit of the mixed-blood seeking to dispose of his shares.

While we therefore conclude that petitioners are not entitled to recover against the United States in the *Affiliated Ute* case or in the *Reyos* case, we add a word about the nature of the relief petitioners now request against the government. In *Reyos*, the individual mixed-blood plaintiffs sought a "money judgment against defendants and each of them for the difference between the value of the consideration actually received by plaintiffs in exchange for their said securities and the fair value thereof" (App. 11-12 [Third Amended Complaint]). In the *Affiliated Ute* case, however, plaintiff sought a "pro rata" distribution of the mineral estate to each mixed-blood and a determination that Affiliated Ute Citizens, rather than the Ute Distribution Corporation, is entitled to manage this property jointly with the full-bloods (App. 538-539 [Complaint]).

Petitioners cannot have it both ways. If the Corporation is invalid, as petitioners argue in *Affiliated Ute*, then its stock is worthless; but if that is so, then plaintiffs in *Reyos* are not entitled to the difference between what they received for the stock and the "fair value" they believe they should have received.

Apparently recognizing the basic inconsistency of their positions in these two consolidated cases, petitioners now for the first time proffer an entirely new claim (Pet. Br. 51-55)—that they are entitled to have the Corporation declared invalid and to recover against the United States the royalties and other payments that they would have received if they had not sold their stock (*id.* at 54). This claim was never

raised before the district court or the court of appeals;[50] neither court ever considered such a contention. Indeed, in view of the amounts paid for their shares it appears quite likely that on this theory many of the plaintiffs in *Reyos* have suffered no damages at all.[51] In this situation, petitioners' newly

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[50] Nor was it raised in petitioners' Petition for a Writ of Certiorari or Reply Brief filed in response to respondents' briefs in opposition. See Rule 23(1)(c) of the Rules of this Court.

[51] Petitioners' calculations (Pet. Br. 54 n. 172) of what these royalties and other payments totalled are not accurately substantiated and appear to involve duplications and other serious errors. First, petitioners refer to Appendix 528-529 and somehow arrive at the figure of $853.97 per share. But the only payment mentioned by the district court on pages 528-529 of the Appendix is the sum of $1,173,632.23, which was distributed to the stockholders of the Corporation as their portion of a $7,900,000 judgment against the United States in 1965. This comes to about $240 per share. The only other amounts even referred to by the district court on the cited pages are the $1200 held in trust for each mixed-blood to defray costs of litigation (part of which had been expended), and another $7,000,000 judgment against the United States, which had not even been appropriated, let alone divided between the various bands of the Ute Tribe (see note 4 *supra*) and then between the full-bloods and mixed-bloods and distributed through the Corporation. (The court also mentioned a $500,000 special appropriation that was pending before Congress.)

Petitioners also refer to App. 503, which supposedly represents another $357 per share. But that reference consists only of a statement by the Superintendent of the Reservation in 1964 mentioning the judgment of $7,900,000 against the United States, which petitioners have already included in their calculations, and the possibility of further judgments.

Petitioners also cite App. 258, 326-328, for the proposition that mineral royalties averaged $71 per share per year; they

devised claim comes too late for consideration by this Court. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16; *Husty* v. *United States*, 282 U.S. 694, 701-702; *Duignan* v. *United States*, 274 U.S. 195, 200. In any event, for the reasons previously stated (*supra* pp. 37-47), there was no breach by the United States of any duty owing to petitioners, under any theory of recovery.

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multiply this by 8 and arrive at an additional sum of $568 per share. App. 258 is a reference to a witness' statement that since 1961, $710 per share has been paid by the Corporation to its shareholders. Since the plaintiffs in *Reyos* did not sell until 1963 or 1964, they have already received part of this $710. Moreover, the witness said that part of this $710 was derived from claims against the United States, which petitioners have already included in their figures. The other pages cited, App. 326-328, give the breakdown of the $710 per share paid since 1961: "$462 of that amount has come from claims" and "248.50 has come from oil and gas leases, royalties, rentals, and proceeds of the reservation, prospecting" (App. 328). Payments after 1963 totalled $571 per share (App. 327-328).

In view of the facts that plaintiffs sold their shares for between $300 and $700 per share (App. 529) and that the great majority of these sales took place well after 1963 (App. 475, 479-484, 487-495, 497-498), it seems certain that if the measure of damages is, as petitioners now claim for the first time, the amount of payments from the Corporation that plaintiffs would have received, less the amount they received from their sale of stock, many of these plaintiffs have suffered no damages whatsoever. It is clear in any event that the figure of $1,778.97 per share that petitioners represent in their brief, at p. 54 n. 172, is inaccurate.

III.

Under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 Thereunder a Seller may Recover Against the Agent who Transfers His Securities Where the Agent Develops a Market for the Seller's Securities and Reaps a Financial Gain from the Buyers by Facilitating Transfers of These Securities, but Fails to Disclose to the Seller the Agent's Financial Interest in the Transaction and the Fact That the Securities Are Selling for a Significantly Higher Price in the Market Developed by the Agent

A.

Statement Relating to the Claims Under the Securities Laws

As previously stated, *supra*, pp. 4 to 6, the Securities and Exchange Commission is vitally interested in the issues in the *Reyos* case involving Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, which are presented by petitioners' claims against the First Security Bank of Utah, N.A. and its employees, John B. Gale and Verl Haslem.

With respect to the Rule 10b-5 claims against these defendants, the parties are in apparent disagreement about the underlying facts and the accuracy of the findings of fact by the district court. The Commission's concern, however, is with Rule 10b-5. This portion of the brief therefore deals solely with the proper interpretation and application of that provision in light of the findings stated in the opinion of the court of appeals or in the opinion of the district court if not contradicted or rejected by

the court of appeals. We make no attempt to resolve the controversy regarding the underlying facts.

After Ute Distribution Corporation had been formed, the Corporation and the Bank entered into an agreement on December 31, 1958, whereby the Bank became transfer agent for the 4900 shares of stock to be issued by the Corporation to the mixed-bloods (Ex. App. 13-15). Under this agreement the Bank also became the depository for the Corporation's funds and agreed to "issue checks against said funds, receive and hold documents, prepare and mail or otherwise deliver statements and reports, and generally conduct business for the Corporation" (*id.* at 14). The agreement further provided that the Corporation "will instruct the Bank from time to time concerning the Bank's duties" (*id.*).

Six months later, in July 1959, the Corporation's attorney wrote to the Bank informing it that the Corporation's stock certificates were to be held by the Bank rather than the individual shareholders (Ex. App. 19-20). The letter also directed the Bank's attention to a resolution of the Corporation [62] and stated that "we trust you will impress upon anyone desiring to make a transfer that there is no possible way of determining the true value of this stock"

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[62] The resolution provided:

> The Board of Directors by unanimous vote directed Attorney John S. Boyden to write a letter to the First Security Bank of Utah, N.A., asking said bank, as transfer agent, to discourage the sale of stock of the Ute Distribution Corporation by any of its stockholders and to emphasize and stress to the said stockholders the importance of retaining said stock. [Ex. App. 19.]

(*id.* at 19). (The Bank's retention of the stock certificates of course minimized "the dissemination of warnings [on the certificates] against disposal of the stock" (App. 516).)

Under the agreement, the Bank also assumed the duty of providing stock transfer services for individual shareholders of the Corporation (Ex. App. 13, 16-17; App. 581). In Roosevelt, Utah, where many mixed-bloods resided, the Bank maintained a branch office in part "for the purpose of facilitating and assisting mixed-bloods in the transfer" of their stock (App. 469, 581). Defendants Gale and Haslem served as Assistant Managers of the Roosevelt office; both were notaries public (*id.* at 467).

Because all sales of stock by the mixed-bloods before August 27, 1964, were subject to the right of first refusal (see p. 12, *supra*), and since the Bank had possession of the stock certificates, any mixed-blood seeking to dispose of his stock had to deal with and effect any transfers through the Bank. With respect to most of the sales by the plaintiffs in *Reyos*, when the right of first refusal was not exercised by members of the Tribe, and when the shares were then purchased by a non-Indian, Gale or Haslem prepared and notarized the necessary transfer papers, including affidavits by the mixed-blood sellers stating that they had received no less than the price at which the shares had been offered to members of the Tribe (App. 582).[53] The actual

[53] In some cases the affidavits were signed before having been filled in (App. 482-483) and in one case Gale dissuaded a seller from reading the affidavit before signing it (App. 483-484).

transfers of stock were handled in the Bank's office in Salt Lake City (App. 512).

In the *Reyos* case, a group of mixed-blood sellers (see n. 16, *supra*) sued the Bank and Gale and Haslem, claiming that in connection with their sales of stock the defendants had violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder and were therefore liable to them for "the difference between the value of the consideration actually received by plaintiffs in exchange for their said securities and the fair value thereof" (App. 11-12).

The district court found that Bank employees Gale and Haslem were acting within the scope of their authority in connection with the transfers of stock in which they participated (App. 526) and concluded that the defendant Bank and defendants Gale and Haslem had engaged in a course of business or scheme to defraud the mixed-bloods that subparagraphs (1) and (3) of Rule 10b-5 expressly prohibited (*id.* at 527):

> [T]he defendants Gale and Haslem devised a plan or scheme to acquire stock in the Ute Distribution Corporation from the mixed-bloods and to aid and abet others in acquiring such stock for their own profit, the profit of others and in order to promote bank deposits and activity in other respects. By means of withholding information necessary to render what was stated or implied by them not misleading, and in violation of their duties to make full and fair disclosure to the designated plaintiffs, they aided, abetted and assisted, or directly and completely accom-

plished the acquisition of said stock from each of the designated mixed-bloods for substantially less than the fair market value of said stock.

The elements of the scheme, as found by the district court, were intricate and varied, having as their objective the transfer of shares from their original mixed-blood holders to the defendant Bank employees and other non-Indians who were actively interested in purchasing and trading this stock. The "non-Indian" market for the shares was generally higher than the "Indian" market in which the mixed-bloods sold their shares. Mixed-bloods sold at prices ranging between $300 and $700 per share and averaging $500 per share, while the same shares were selling in the non-Indian market for between $500 and $700 per share (App. 529). These defendants admittedly accepted from non-Indians, including out-of-state buyers, standing orders to buy stock in the Corporation (App. 76, 84, 522; Ex. App. 87-88, 91); in some cases potential purchasers maintained deposits at the Bank for the purpose of consummating the transactions (App. 522). The district court found that these defendants actively solicited offers to buy from non-Indians (App. 522) and received various fees, commissions, bonuses, tips and gratuities from non-Indians for their services in facilitating the transfer of this stock (App. 521).[44] In several cases these

[44] This finding is not inconsistent with the conclusion of the court of appeals that "The record does not show whether or not the defendant Gale participated for his personal profit or derived a personal profit from the purchase by other persons of shares of stock from the plaintiffs" (App. 584). The

defendants (in collaboration with used car dealers and other non-Indian potential purchasers) induced the mixed-bloods to sell their shares (App. 522).[86] In one case, Gale, who was also a Justice of the Peace, suggested to an Indian brought before him on a charge of intoxication that he sell his stock as a means of paying the fine for his drunkenness (App. 485). Since the district court found that the Bank and its employees, Gale and Haslem, had engaged in a scheme to defraud all of the plaintiffs, it held these defendants liable for damages suffered by each plaintiff (App. 537, 574).

The court of appeals reversed in part, finding liability under Rule 10b-5 only in those instances in which defendants Gale and Haslem personally purchased shares from a plaintiff for their own account or for the purpose of resale to an undisclosed principal at a higher price (App. 587).[86] Relying on

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court there was apparently focusing on "profits" derived from resale of the stock at a higher price than that paid to plaintiffs, for the record is clear that Gale admitted receiving commissions and other payments for facilitating non-Indian purchases (App. 65, 76, 84, 88).

[86] In one case, a plaintiff made several sales of stock, the first of which was in exchange for a used car even though plaintiff was unable to drive. The district court found (App. 483):

> [She] was in need of money and on public welfare at the time of the first sale and the second and third sales were made because she was in further need of money, having been taken off welfare by reason of the money which she was supposed to have received on the first sale. * * *

[86] The court of appeals noted that, together, Gale and Haslem purchased a total of 16 shares (App. 583-584). Of these,

subparagraph (2) of Rule 10b-5, which prohibits false and misleading statements and omissions in securities transactions, the court held "that the individual defendants made a misstatement of a material fact in representing, in those instances wherein they purchased stock for sale at a personal profit, that the prevailing price or market price was the figure at which their own purchase was made" (App. 585).

As to the other transactions, the court of appeals found that defendants did "no more than to perform ministerial functions required to carry out the transfer of the shares of stock" (App. 584). Although the conduct of the defendant Bank officials in encouraging and developing a non-Indian market in the stock was "probably not contemplated by the UDC-bank relationship" and "gave rise to some indirect benefits to the bank by way of increased deposits" (App. 583), the court held that this conduct "did not constitute a violation of any duty the bank may have had to the plaintiffs by contract or otherwise" (*id.*). The court rejected without explanation the district court's finding of a scheme to defraud by concluding: "The record does not support the trial court's finding of a conspiracy, plan, or scheme to violate any duties owed to the plaintiffs by any of the defendants" (App. 586).[57]

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8 shares were resold at a higher price (all by Gale); the record did not show whether higher resale prices were received for the other shares (*id.*).

[57] In those instances where the court found violations, it remanded on the question of damages, holding that the record

B.

The Non-Government Defendants Had a Duty to Disclose to Plaintiffs That They Had a Financial Interest in Plaintiffs' Sales of Stock and That the Stock Was Selling for a Higher Price in the Non-Indian Market

Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful for "any person, directly or indirectly" to employ "in connection with the purchase or sale of any security * * * any manipulative or deceptive device or contrivance" that contravenes Commission rules. One such rule adopted by the Commission under this Section is Rule 10b-5, which makes it unlawful for "any person, directly or indirectly" to engage in fraudulent conduct in connection with securities transactions. The Rule expressly prohibits not only the making of "any untrue statement of a material fact" and omissions to state such facts (Rule 10b-5(2)), but also the use of "any de-

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did not support the district court's computation of damages. The Commission disagrees with the court's statement that: "The measure of damages * * * is the profit made by the defendant on resale of stock purchased from the plaintiffs. If no resale was made or if the resale was not at arm's length, then the measure is the prevailing market price at the time of the purchase from the plaintiffs" (App. 587). The measure of damages should always be at least equal to the plaintiff's loss—that is, the difference between the price he received and the price he would have received had there been no fraudulent conduct (usually the fair market price). A measure of damages based upon the profits, if any, realized by the defendant is appropriate only if that amount is greater than the plaintiff's actual loss, the theory in such case being that the shares are held in constructive trust for the plaintiff and that the defendant should not be enriched by his wrongdoing. *Janigan* v. *Taylor*, 344 F.2d 781 (C.A. 1), certiorari denied, 382 U.S. 879.

vice, scheme, or artifice to defraud" (Rule 10b-5(1)) and the pursuit of "any act, practice, or course of business which operates * * * as a fraud upon any person" (Rule 10b-5(3)). These proscriptions are manifestly broad on their face, and are to be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes," *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195.

The court of appeals properly held that the Bank and its employees, Gale and Haslem, violated Rule 10b-5(2) in connection with those transactions where the Bank employees purchased UDC shares from the plaintiffs as principals or as agents for undisclosed principals. In those cases, the

> individual defendants made a misstatement of a material fact in representing * * * that the prevaling price or market price [of the shares] was the figure at which their own purchase was made. This representation was obviously false in those instances in view of the fact that they resold the shares almost immediately at a higher price. * * * [App. 585.]

However, the court of appeals apparently concluded that no other violations of Rule 10b-5 could be found unless the defendants "purchased stock [from the plaintiffs] for sale at a personal profit" (App. 585) and unless the record contained "evidence relating to reliance by the plaintiffs on the representations of the defendants Gale and Haslem" (App. 586). In the Commission's view, Rule 10b-5 is not limited to those situations alone. Rule 10b-5(1) and (3) require no

more than a showing that defendants pursued a "course of business" or employed a "device, scheme or artifice" that operated as a fraud on sellers. Assessing the non-government defendants conduct as set forth in the opinion of the court of appeals, we submit that they pursued a "course of business" and employed "device[s], scheme[s], [and] artifice[s]" that operated as a fraud on all of the mixed-blood sellers of UDC shares because these defendants devised and executed a systematic plan to induce the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their investment decisions.

The court of appeals emphasized that defendants Gale and Haslem merely performed "ministerial functions required to carry out the transfer of the shares of stock" in those instances where they did not themselves purchase or represent purchasers of stock from the Indians (App. 584). But defendants' involvement in these transactions as transfer agents and notaries public hardly constituted the sum and substance of their interest in the sale of UDC stock by Indians to non-Indians. The court of appeals itself observed that (App. 583):

> The record shows that the bank officials * * * were active in encouraging a market for the UDC stock among non-Indians. This was probably not contemplated by the UDC-bank relationship. This gave rise to some indirect benefits to the bank by way of increased deposits, but it did not constitute a violation of any duty

the bank may have had to the plaintiffs by contract or otherwise.

Defendants encouraged and developed this market for UDC shares by, among other things, accepting standing orders to buy UDC stock from non-Indians, who in many instances maintained deposits at the Bank to cover purchases by them and on their behalf (App. 522; Ex. App. 87-88, 91; see also App. 75-76, 84-85 [testimony of defendant Gale]). In addition to receiving increased deposits by developing a market for these shares, defendants also received, according to the findings of the district court, "various fees, commissions, bonuses, tips, or gratuities from non-Indians for their services in facilitating the transfer" of UDC stock from the mixed-bloods to non-Indians (App. 521). The court of appeals also found that because the Bank and its defendant employees had developed a market for the stock they were "entirely familiar with the prevailing market for the shares at all material times" (App. 586)—a market in which the price per share averaged $500 for sales by the mixed-bloods, but in which sales between non-Indians ranged between $500 and $700 per share (App. 529). Yet the Bank itself had acknowledged its "duty to see that these transfers were properly made" and that it "would be acting for the individual stockholders" in such transfers (Ex. App. 16-17). And, as the court of appeals also found, the mixed-blood sellers "considered these defendants to be familiar with the market for the shares of stock and relied upon them when they desired to sell their shares" (App. 585); indeed they had no

choice since the Bank had physical possession of their stock certificates and handled the documents necessary for transfers.

Although on these facts, together with defendants' purchases on their own behalf, defendants' activities would bring them squarely within the definition of "brokers" and "dealers" in Sections 3(a)(4) and (5) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(4) and (5), those Sections expressly exempt banks from coverage. Sections 3(a)(4) and (5) provide:

> (4) The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.
>
> (5) The term "dealer" means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

Therefore, unlike other brokers and dealers in securities, neither the defendant bank nor its employees were required to register as broker-dealers under the Act. But they nevertheless remained subject to the broad antifraud prohibitions of Section 10(b) and the Commission's Rule 10b-5 thereunder, which apply to "any person," whether a registered broker-dealer or not.[58] With respect to the obligations of dis-

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[58] Under Section 15(c)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c)(1), brokers and dealers are pro-

closure imposed by those provisions, defendants thus had obligations analogous to those that have been imposed on other professionals in the securities business. For such obligations stem fundamentally not from the fact of registration under the Securities Exchange Act (which is primarily a mechanism to identify the persons to be regulated and to control their entry into and operations within the securities industry), but rather from the fiduciary relationship between persons acting as brokers, such as the defendants here, and their customers.

We agree that if the Bank had operated merely as a transfer agent, it would have had no duty of disclosure. However, when the Bank and its employees extended their activities beyond this, when they encouraged and developed a market for the shares, when they acted on behalf of non-Indian purchasers and received from them commissions, gratuities, bank deposits and other forms of remuneration and profit from their activities,[59] in short, when they

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hibited from engaging in "any manipulative, deceptive, or other fraudulent device or contrivance"—much the same language as appears in Section 10(b)—and the Commission is authorized to "define such devices or contrivances" by rule. Rule 15c1-2, 17 C.F.R. 240.15c1-2, which supplies this definition, is virtually coterminous with Rule 10b-5.

[59] Since the Bank also had physical possession of the shares owned by the mixed-bloods, the non-government defendants' activities were in several respects similar to market-making, which involves the purchase and sale of particular securities at prices set from time to time by the market-maker. Such a market-maker ordinarily maintains an "inventory" consisting of shares of each stock in which he makes a market. He profits by selling shares from this inventory at a higher price than he paid for them and in some cases by selling

engaged in all these "non-ministerial" activities in connection with the sales at the same time they were obligated to act on behalf of the mixed-blood sellers, they had a duty of disclosure. They could not participate in any transactions in UDC shares—even to the extent of performing what the court below referred to as "ministerial functions"—without disclosing to the selling mixed-bloods that the Bank and its employees had a personal economic interest in the consummation of their transactions and that the stock was being sold for significantly higher prices between non-Indians.

In *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, *supra*, 375 U.S. at 194, this Court defined the obligations of fiduciaries in securities transactions. The Court held that " 'Fraud * * * includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another' " and that:

> Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients.[60]

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shares "short" (*i.e.*, selling borrowed shares) and covering with shares purchased at a lower price than that at which he sold. Obviously, a market cannot be made unless shares are readily available for purchase, sale and the market-maker's inventory. See Rule 17a-9(f)(1) under the Securities Exchange Act of 1934, 17 C.F.R. 240.17a-19(f); *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d 1167 (C.A. 2).

[60] See also *Errion* v. *Connell*, 236 F. 2d 447 (C.A. 9); *McClure* v. *Borne Chemical Co.*, 292 F. 2d 824 (C.A. 3), certior-

In a situation analogous to this case, the Court of Appeals for the Second Circuit held that under certain circumstances a broker-dealer who makes recommendations to an investor has an affirmative obligation to disclose the fact that the broker-dealer is a market-maker in the securities recommended, whether or not the price at which the securities are sold to the investor is fair; failure to make such disclosure constitutes a violation of Section 10(b) and of Rule 10b-5. *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d 1167 (C.A. 2).[61] As the court there observed, 438 F. 2d at 1172:

> An investor who is at least informed of the possibility of such adverse interests, due to his broker's market making in the securities recommended, can question the reasons for the recommendations. The investor * * * must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self interest * * *.

To be sure, in some of the transactions in this case defendants handled the transfer of stock without making any representations or recommendations. But defendants could not simply stand mute while they facilitated the mixed-bloods' sales to used car dealers and others seeking profit in the non-Indian market that, as the court of appeals found, the defendants themselves had encouraged and developed and were

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ari denied, 368 U.S. 939; *Rekant* v. *Desser*, 425 F. 2d 872 (C.A. 5).

[61] See *Hughes* v. *Securities and Exchange Commission*, 174 F. 2d 969 (C.A.D.C.).

entirely familiar with."[62] The mixed-bloods had the right to know that defendants were reaping financial benefits from their sales and that their shares were selling for a significantly higher price in the non-Indian market that defendants had developed.

By failing to make these disclosures, defendants engaged in a "course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security" in violation of Rule 10b-5(3); their activities also constituted a "scheme * * * to defraud" in violation of Rule 10b-5(1). The fraudulent course of business pursued by defendants is in some respects unique and for that reason previous cases involve only analogous activities. But Rule 10b-5 encompasses "[n]ovel or atypical" as well as "garden type variety" frauds, *A. T. Brod & Co.* v. *Perlow*, 375 F. 2d 393, 397 (C.A. 2); see also *Carroll* v. *First National Bank*, 413 F. 2d 353, 357 (C.A. 7), certiorari denied, 396 U.S. 1003, and it prohibits the course of conduct engaged in by the non-government defendants here.

In addition, at least in the circumstances of this case where the misconduct involves a failure to disclose material facts rather than the making of affirmative statements that are false and misleading,

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[62] Compare *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del.); *Cochran* v. *Channing Corp.*, 211 F. Supp. 239, 243 (S.D.N.Y.); *Trussell* v. *United Underwriters, Ltd.*, 288 F. Supp. 757, 767 (D. Colo.), all recognizing that total silence can violate paragraphs (1) and (3) of Rule 10b-5. See also *Strong* v. *Repide*, 213 U.S. 419; *Brennan* v. *Midwestern United Life Insurance Co.*, 417 F. 2d 147 (C.A. 7); *List* v. *Fashion Park, Inc.*, 340 F. 2d 457 (C.A. 2), certiorari denied, 382 U.S. 811.

proof of reliance is not a prerequisite to recovery; it is wholly conjectural whether an investor would in fact have acted differently had he been advised of all material facts.[63] In such situations, it is necessary only that the facts withheld be "material"; that is, information a reasonable investor "might have * * * considered important" in determining his course of action. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 384; see also *Securities and Exchange Commission* v. *Texas Gulf Sulphur*, 401 F. 2d 833, 849, certiorari denied *sub nom. Coates* v. *Securities and Exchange Commission*, 394 U.S. 976. If the defendant owed an obligation of disclosure, and if it is shown that "material" facts were withheld, this proof suffices to establish the requisite element of causation in fact. *Chasins* v. *Smith, Barney & Co.*, *supra*, 438 F. 2d at 1172.

Here there can be no doubt of the materiality of the facts not disclosed by the defendants—that the shares were selling for a significantly higher price in the non-Indian market and that defendants had an economic stake over and above their fee for acting as transfer agents in facilitating transfers. Had the mixed-blood sellers known of these facts they might not have sold at all; at the least they might have sought a higher price for their shares. That some of the mixed-bloods might have been unsophisticated about matters of finance is not a reason for denying them relief. Rule 10b-5 surely does not mean that

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[63] See Bromberg, *Securities Law: Fraud—S.E.C. Rule 10b-5, part* 8.6, p. 209; 6 Loss, *Securities Regulation* 3878-3880 (1969). *List* v. *Fashion Park, Inc.*, 340 F .2d 457 (C.A. 2), is not to the contrary.

the more gullible the seller the more a fiduciary is free to engage in fraudulent practices in connection with sales of the seller's securities.

CONCLUSION

With respect to petitioners' claims against the United States, the judgments of the court of appeals in *Affiliated Ute Citizens* and *Reyos* should be affirmed. With respect to petitioners' claims against the Bank and its employees under the Securities Exchange Act of 1934, the judgment of the court of appeals rejecting petitioners' claims in *Reyos* should be reversed.

Respectfully submitted.

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SEPTEMBER 1971.

APPENDIX

The Ute Partition Act of August 27, 1954, 68 Stat. 868, as amended, 25 U.S.C. 677—677aa, provides:

§ 677. Purpose.

The purpose of sections 677 to 677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property. (Aug. 27, 1954, ch. 1009, § 1, 68 Stat. 868.)

§ 677a. Definitions.

For the purposes of sections 677 to 677aa of this title—

(a) "Tribe" means the Ute Indian Tribe of the Unitah and Ouray Reservation, Utah.

(b) "Full-blood" means a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 677c of this title.

(c) "Mixed-blood" means a member of the tribe who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice under the provisions of section 677c of this title.

(d) "Secretary" means Secretary of the Interior.

(e) "Superintendent" means the Superintendent of the Unitah and Ouray Reservation, Utah.

(f) "Asset" means any property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States.

(g) "Adult" means a member of the tribe who has attained the age of twenty-one years. (Aug. 27, 1954, ch. 1009, § 2, 68 Stat. 868.)

§ 677b. Method of determining Ute Indian blood.

For the purposes of sections 677 to 677c of this title Ute Indian blood shall be determined in accordance with the constitution and bylaws of the tribe and all tribal ordinances in force and effect on August 27, 1954. (Aug. 27, 1954, ch. 1009, § 3, 68 Stat. 868.)

§ 677c. Transfer of members from full-blood roll to mixed-blood group; time; certification by Secretary.

Any member of the tribe whose name appears on the proposed roll of full-blood members as provided in section 677g of this title and any person whose name is added to such proposed roll as the result of an appeal to the Secretary may apply to the Superintendent to become identified with and a part of the mixed-blood group: *Provided*, That such application is made within thirty days subsequent to the publication of such proposed roll or in the event of an appeal within

thirty days subsequent to notification of the decision on said appeal: *And provided further*, That before such transfer is made upon the official rolls the Secretary shall first certify that, in his opinion, such change in status is not detrimental to the best interest of the person seeking such change. (Aug. 27, 1954, ch. 1009, § 4, 68 Stat. 868.)

§ 677d. Restriction of tribe to full-blood members after publication of final rolls; non-interest of mixed-blood members; new membership.

Effective on the date of publication of the final rolls as provided in section 677g of this title the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in sections 677 to 677aa of this title. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder. (Aug. 27, 1954, ch. 1009, § 5, 68 Stat. 868; Aug. 2, 1956, ch. 880, § 1, 70 Stat. 936.)

§ 677e. Organization of mixed-blood members; constitution and bylaws; representatives; actions in absence of organization.

The mixed-blood members of the tribe, including those residing on and off the reservation, shall have the right to organize for their common welfare, and may adopt an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a

special election authorized and called by the Secretary under such rules and regulations as he may prescribe. Such constitution may provide for the selection of authorized representatives who shall have power to take any action that is required by sections 677 to 677aa of this title to be taken by the mixed-blood members as a group: *Provided*, That nothing herein contained shall be construed as requiring said mixed-blood Indians to so organize if such organization is by them deemed unnecessary. In the event no such approved organization is effected, any action taken by the adult mixed-blood members, by majority vote, whether in public meeting or by referendum, but in either event, after such notice as may be prescribed by the Secretary, shall be binding upon said mixed-blood members of the tribe for the purposes of said sections. (Aug. 27, 1954, ch. 1009, § 6, 68 Stat. 868.)

§ 677f. Employment of legal counsel for mixed-blood members; fees.

The mixed-blood members of the tribe as a group may employ legal counsel to accomplish the legal work required on behalf of said group under the terms of sections 677 to 677aa of this title, and for any other purpose by them deemed necessary or desirable; the choice of counsel and fixing of fees to be subject to the approval of the Secretary until Federal supervision over all of the members of said group and their property is terminated in the manner provided in section 677*o* of this title. (Aug. 27, 1954, ch. 1009, § 7, 68 Stat. 869.)

§ 677g. Membership rolls of full-blood and mixed-blood members; preparation and initial publication; appeal from inclusion or omission from rolls; finality of determination; final publication; inheritable interest; future membership.

The tribe shall have a period of thirty days from August 27, 1954 in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe, living on August 27, 1954. If the tribe fails to submit such proposed rolls within the time specified in sections 677 to 677aa of this title, the Secretary shall prepare such proposed rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in either of the papers of general circulation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of all such appeals to the Secretary, and after all transfers have been made pursuant to section 677c of this title the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall

be published in the Federal Register, and such rolls shall be final for the purposes of sections 677 to 677aa of this title, but said sections shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership in the tribe, after August 27, 1954, in the manner provided in the constitution and bylaws of the tribe. (Aug. 27, 1954, ch. 1009, § 8, 68 Stat. 869; Aug. 2, 1956, ch. 880, § 2, 70 Stat. 936.)

§ 677h. Sale or other disposition of certain described lands; funds; relief of United States from liability; assigned lands.

The business commitee of the tribe for and on behalf of the full-blood members of said tribe, and the duly authorized representatives for the mixed-blood members of said tribe, acting jointly, are authorized, subject to the approval of the Secretary, to sell, exchange, dispose of, and convey to any purchaser deemed satisfactory to said committee and representatives, any or all of the lands of said tribe described as follows, to wit: [Omitted.]

All such sales, exchanges, or other dispositions shall be made upon such terms as said committee and said authorized representatives shall deem satisfactory and may be made pursuant to bids or at private sale, and all funds or other property derived from such sales, exchanges, or other dispositions shall be subject to the terms of sections 677 to 677aa of this title. Consent by the tribal business committee and said authorized representatives to the sale, exchange, or other disposal of the lands herein described shall relieve the United States of any liability result-

ing from such sale, exchange, or other disposition. The tribal business committee and said authorized representatives are further authorized to sell or dispose of tribal assigned lands to the assignees thereof under such terms and conditions as may be agreed upon by the said tribal business committee and said authorized representatives with the assignees, subject, however, to the approval of the Secretary. (Aug. 27, 1954, ch. 1009, § 9, 68 Stat. 869.)

§ 677i. Division of assets; basis; prior alienation or encumbrance; partition by Secretary upon nonagreement; assistance; management of claims and rights; division of net proceeds; applicability of usual processes of the law to originally owned stock of corporate representative and to corporate distributions.

The tribal business committee representing the full-blood group, and the authorized representatives of the mixed-blood group, within sixty days after the publication of the final membership roll, as provided in section 677g of this title, shall commence a division of the assets of the tribe that are then susceptible to equitable and practicable distribution. Such division shall be by agreement between them subject to the approval of the Secretary. Said division shall be based upon the relative number of persons comprising the final membership roll of each group. After such division the rights or beneficial interests in tribal property of each mixed-blood person whose name appears on the roll shall constitute an undivided interest in and to such property which may be inherited or bequeathed, but shall be subject to alienation or

encumbrance before the transfer of title to such tribal property only as provided in sections 677 to 677aa of this title. Any contract made in violation of this section shall be null and void. If said groups are unable to agree upon said division within a period of twelve months from the date of such commencement, or any authorized extension of said period granted within the discretion of the Secretary, the Secretary is authorized to partition the assets of the tribe in such manner as in his opinion will be equitable and fair to both groups. Such partition shall give rise to no cause of action against the United States and the costs of such partition shall be paid by the tribe. The Secretary is authorized to provide such reasonable assistance as may be requested by both groups, or by either group, in formulation and execution of a plan for the division of said assets, including necessary technical services of Government employes at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah, and political subdivisions thereof, and members of the tribe. All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such management shall first be divided between the full-blood and mixed-

blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of such proceeds.

The stock of any corporation organized by the mixed-blood group for the purpose of empowering the officers of such corporation to act as the authorized representatives of said mixed-blood group in the joint management with the tribe and in the distribution and[1] unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock remains in the ownership of the original stockholder or his heirs or legatees, but the interest of stockholders in any distribution by such corporation shall be subject to the usual processes of the law. (Aug. 27, 1954, ch. 1009, § 10, 68 Stat. 873; Sept. 25, 1962, Pub. L. 87-698, 76 Stat. 597.)

§ 677j. Advances or expenditures from tribal funds; restrictions on mixed-blood group until adoption of plan for terminating supervision.

Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter deposited in the United States Treasury to the credit of the tribe or either group thereof, shall be available for advance to the tribe or the

[1] So in original. Probably should be "of".

respective groups, or for expenditure, for such purposes, including per capita payments, as may be designated by the Tribal Business Committee for the full-blood members, and by the authorized agents of the mixed-blood members, and in either event subject to the approval of the Secretary: *Provided*, That the aggregate amount of the expenditures and advances authorized by this section for the mixed-blood group shall not exceed 50 per centum of the total funds of said mixed-blood group after such division, until said mixed-blood group has adopted a plan approved by the Secretary for termination of Federal supervision of said mixed-blood group, as required under section 677*l* of this title. After such termination of Federal supervision, per capita payments to the mixed-blood group shall not be subject to approval of the Secretary. (Aug. 27, 1954, ch. 1009, § 11, 68 Stat. 873.)

§ 677k. Adjustment of debts in making per capita payments to mixed-blood members; execution of mortgages on property.

Fifty per centum of all per capita payments to any individual mixed-blood member made pursuant to any division or distribution under sections 677 to 677aa of this title shall have deducted therefrom any sum or sums of money owed by such member to the tribe, whether due or to become due, unless in the opinion of the Secretary said debts are not adequately secured in which event the entire per capita payment shall be subject to such offset. Any other division, partition or distribution of property to any individual mixed-blood member made pursuant to sections 677 to 677aa of this title shall be subject to a mortgage to be made in favor of

the tribe securing the payment of all sums of money owed by him to the tribe on the date of such division, partition or distribution to such individual mixed-blood member. The Secretary shall require the execution of any mortgage required under this section as a condition to any such division, partition or distribution. (Aug. 27, 1954, ch. 1009, § 12, 68 Stat. 874.)

§ 677*l*. Distribution to individual members of mixed-blood group; preparation and approval of plan; assistance; provisions permitted in plan.

After the adoption of a plan for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof shall be prepared and ratified by a majority of said group, within the period of six months from such adoption and presented to the Secretary for approval. The Secretary is authorized to provide such reasonable assistance, including necessary technical service of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah and political subdivisions thereof, as may be required by the mixed-blood group in the preparation of such plan.

The plan for division of the assets among the members of the mixed-blood group may include:

(1) Complete disposition of all cash assets of said group, reserving, however, sufficient funds to cover—

(i) the proportionate share of said mixed-blood group in and to all expenses incurred in effecting the purposes of sections 677 to 677aa of this title, including, but not limited to, the necessary expense incurred under this section and section 677m of this title;

(ii) the just and proportionate share of the mixed-bloods in the expense incurred in the prosecution of the claims of the tribe, or the bands thereof, against the United States; and

(iii) the determinable and estimated administrative costs and expenses of any mixed-blood organization authorized by sections 677 to 677aa of this title, including lawful and reasonable salaries and fees of authorized agents, officers and employees of said mixed-blood group.

(2) Partition of the lands of the mixed-blood group, excepting all gas, oil, and mineral rights, to corporations, partnerships, or other legal entities, and to trustees, and the individual members of said groups, quality and quantity relatively considered, according to the respective rights and interests of the parties, located so as to embrace, as far as practicable, any improvements lawfully made by the person or persons receiving such land. The value of the improvements made, under a valid lease or assignment from the tribe, shall be excluded from the valuation in making allotments to the lessee or assignee, and the land must be valued without regard to such improve-

ments unless the lease or assignment, under which said improvements were made, provided that such improvements should become the property of the tribe. In the making of any partition due consideration shall be given to all of the rights and interests of the person or persons receiving the property, and all of the rights and interests of the other members of the tribe. Two or more of the members of said mixed-blood group may obtain their share of property as tenants in common, as joint tenants, or in any other lawful manner when such members agree among themselves as to the manner in which they desire to receive such title. When it appears that an equitable partition cannot be made among the members of said mixed-blood group without prejudice to the rights and interests of some of them, and yet a partition is directed by the group, the members of said group may voluntarily determine compensation to be made by one party to another on account of the inequity. In all cases where equity is agreed upon by the members of said mixed-blood group, such compensatory adjustment among the parties, according to the principles of equity, must be approved by the Secretary. In the event of a failure to agree upon an equitable compensatory adjustment among the parties the Secretary shall make such adjustment and his decision shall be final.

(3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in

proportion to their interests in the assets of such corporations. When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or other legal entity for any purpose, the Secretary is authorized to make such transfer.

(4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. The Secretary is authorized to make such transfer, and approve the trustees, and the terms and conditions of the trust.

(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group; after deducting reasonable cost of sale and distribution.

(Aug. 27, 1954, ch. 1009, § 13, 68 Stat. 874.)

§ 677m. Same; procedure by Secretary if distribution not completed within seven years from August 27, 1954.

In the event all the tribal assets, susceptible to equitable and practicable distribution, distri-

buted to the mixed-blood group under the provisions of section 677i of this title, are not, within seven years from August 27, 1954, distributed to the individual mixed-blood members as contemplated in the plan to be adopted in accordance with the provisions of section 677*l* of this title, so as to effectively terminate Federal supervision over said assets, then the Secretary shall proceed to make such distribution in a manner, in his discretion, deemed fair and equitable to all members of said group, or convey such assets to a trustee for liquidation and distribution of the net proceeds, or convey such assets to the persons entitled thereto as tenants in common. (Aug. 27, 1954, ch. 1009, § 14, 68 Stat. 875.)

§ 677n. Disposal by mixed-blood members of their individual interests in tribal assets; requisites and conditions.

Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any

patent or deed issued prior to the expiration of said period. (Aug. 27, 1954, ch. 1009, § 15, 68 Stat. 876.)

§ 677*o*. Termination of restrictions on individually owned property of the mixed-blood group.

(a) Transfer of control of trust property; removal of sales restrictions.

When any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 677i of this title, whether such distribution is made in part or in whole to a corporation, partnership, or trusteeship in which he is interested, or otherwise, the Secretary is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States, and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated, except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of sections 677 to 677aa of this title, notwithstanding anything contained in said sections to the contrary.

(b) Partition or sale by Secretary prior to removal of restrictions.

Prior to the removal of restrictions in accordance with the provisions of subsection (a) of this section on land owned by more than one person, the Secretary may—

(1) upon request of any of the owners, partition the land and issue to each owner an unrestricted patent or deed for his individual share, unless such owner is a full-blood member of the tribe or other Indian who owns trust or restricted property, in which event a trust patent or restricted deed shall be issued and such trust may be terminated or such restrictions may be removed when the Secretary determines that the need therefor no longer exists;

(2) upon request of any of the owners and a finding by the Secretary that partition of all or any part of the land is not practicable, cause all or any part of the land to be sold at not less than the appraised value thereof and distribute the proceeds of sale to the owners: *Provided*, That before a sale any one or more of the owners may elect to purchase the other interests in the land, or the tribe may elect to purchase the entire interest in the land, at not less than the appraised value thereof.

(Aug. 27, 1954, ch. 1009, § 16, 68 Stat. 876.)

§ 677p. Tax exemption; exceptions and time limits; valuation for income tax on gains or losses.

No distribution of the assets made under the provisions of sections 677 to 677aa of this title

shall be subject to any Federal or State income tax: *Provided*, That so much of any cash distribution made under said sections as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of said sections be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of said sections shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: *Provided*, That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of sections 677 to 677aa of this title, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any

valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to said sections. (Aug. 27, 1954, ch. 1009, § 17, 68 Stat. 876; Aug. 2, 1956, ch. 880, § 3, 70 Stat. 936.)

§ 677q. Applicability of decedents' estates laws to individual trust property of mixed-blood members.

The laws of the United States with respect to probate of wills, determination of heirship, and the administration of estates shall apply to the individual trust property of mixed-blood members of the tribe until Federal supervision is terminated. Thereafter, the laws of the several States, Territories, possessions, and the District of Columbia within which such mixed-blood members reside at the time of their death shall apply. (Aug. 27, 1954, ch. 1009, § 18, 68 Stat. 877.)

§ 677r. Indian claims unaffected.

Nothing in sections 677 to 677aa of this title shall affect any claim heretofore filed against the United States by the tribe, or the individual bands comprising the tribe. (Aug. 27, 1954, ch. 1009, § 19, 68 Stat. 877.)

§ 677s. Valid leases, permits, liens, etc., unaffected.

Nothing in sections 677 to 677aa of this title shall abrogate any valid lease, permit, license, right-of-way, lien, or other contract heretofore approved. (Aug. 27, 1954, ch. 1009, § 20, 68 Stat. 877.)

§ 677t. Water rights.

Nothing in sections 677 to 677aa of this title shall abrogate any water rights of the tribe or its members. (Aug. 27, 1954, ch. 1009, § 21, 68 Stat. 877.)

§ 677u. Protection of minors, persons non compos mentis, and other members needing assistance; guardians.

For the purposes of sections 677 to 677aa of this title, the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or, in the opinion of the Secretary, in need of assistance in conducting their affairs, by such means as he may deem adequate, but appointment of guardians pursuant to State laws, in any case, shall not be required until Federal supervision has terminated. (Aug. 27, 1954, ch. 1009, § 22, 68 Stat. 877.)

§ 677v. Termination of Federal trust; publication; termination of Federal services; application of Federal and State laws.

Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated. Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall

apply to such member in the same manner as they apply to other citizens within their jurisdiction. (Aug. 27, 1954, ch. 1009, § 23, 68 Stat. 877.)

§ 677w. Presentation of development program for full-blood group to eventually terminate Federal supervision; annual progress reports.

Within three months after August 27, 1954, the business committe of the tribe representing the full-blood group thereof shall present to the Secretary a development program calculated to assist in making the tribe and the members thereof self-supporting, without any special Government assistance, with a view of eventually terminating all Federal supervision of the tribe and its members. The tribal business committee, representing the full-blood group shall, through the Secretary of the Interior, make a full and complete annual progress report to the Congress of its activities, and of the expenditures authorized under sections 677 to 677aa of this title. (Aug. 27, 1954, ch. 1009, § 24, 68 Stat. 877.)

§ 677x. Citizenship status unaffected.

Nothing in sections 677 to 677aa of this title, shall affect the status of the members of the tribe as citizens of the United States. (Aug. 27, 1954, ch. 1009, § 25, 68. Stat. 877.)

§ 677y. Execution by Secretary of patents, deeds, etc.

The Secretary shall have authority to execute such patents, deeds, assignments, releases, certificates, contracts, and other instruments, as may be necessary or appropriate to carry out

the provisions of sections 677 to 677aa of this title, or to establish a marketable and recordable title to any property disposed of pursuant to said sections. (Aug. 27, 1954, ch. 1009, § 26, 68 Stat. 877.)

§ 677z. Rules and regulations; tribal or group referenda.

The Secretary is authorized to issue rules and regulations necessary to effectuate the purposes of sections 677 to 677aa of this title, and may, in his discretion, provide for tribal or group referenda on matters pertaining to management or disposition of tribal or group assets. (Aug. 27, 1954, ch. 1009, § 27, 68 Stat. 878.)

§ 677aa. Procedure by Secretary upon non-agreement between mixed-blood and full-blood groups.

Whenever any action pursuant to the provisions of sections 677 to 677aa of this title requires the agreement of the mixed-blood and full-blood groups and such agreement cannot be reached, the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups. (Aug. 27, 1954, ch. 1009, § 28, 68 Stat. 878.)

The Act of August 15, 1894, 28 Stat. 305, as amended 25 U.S.C. 345, provides:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully de-

nied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

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